U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 14 May 2007

CASE NO.: 2006-LHC-863

OWCP NO.: 07-171552

IN THE MATTER OF:

A. S.[1]

Claimant

v.

LOFTON INDUSTRIES, INC.

Employer

and

LOUISIANA WORKERS' COMPENSATION CORPORATION

Carrier

APPEARANCES:

LIONEL H. SUTTON, III, ESQ.
For The Claimant

DAVID K. JOHNSON, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Lofton Industries,

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Inc. (Employer) and Louisiana Workers' Compensation Corporation (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on September 7, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered three exhibits, Employer/Carrier proffered seven exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on August 9, 2004.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That the Employer was notified of the accident/injury on August 9, 2004.

4. That Employer/Carrier filed a Notice of Controversion on September 6, 2005.

5. That an informal conference before the District Director was held on January 31, 2006.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

6. That Claimant received temporary total disability benefits from August 9, 2004 through September 2, 2005 at a compensation rate of $455.40 for 55 weeks, totaling $25,372.29.

7. That Claimant's average weekly wage at the time of injury was $683.09. (Tr. 66).

8. That medical benefits for Claimant have been paid in the amount of $7,238.86 pursuant to Section 7 of the Act. (Tr. 9).

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of cervical injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. The reasonableness and necessity of recommended treatment by Drs. John Cobb and Matthew Mitchell.

5. Entitlement to and authorization for medical care and services.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 40 years old at the time of the formal hearing. He completed ten years of formal education and received a General Equivalency Diploma. (Tr. 18-19). He was hired as an operator rigger by Employer to work for Green's Pressure Test. (Tr. 19).

He was injured on August 9, 2004, when he and a co-worker were "nippling up a wellhead" with a wrench and the "weight [of the wrench] came down on my arm" because the co-worker left

their position to accomplish an associated task. Claimant testified that he was in "extremely a lot of pain" in the left shoulder. (Tr. 22).

Claimant reported the accident to his tool pusher and was taken off the floating structure and eventually examined at Our Lady of Lourdes Hospital. X-rays were taken and pain medication prescribed. (Tr. 24). Employer referred him to Dr. Duval who took an x-ray of his shoulder. Claimant stated Dr. Duval informed him that it was not his shoulder which was injured but his "neck [was] all messed up." He recommended that Claimant return to Dr. Cobb and ordered an MRI of his shoulder. (Tr. 25-26). Dr. Duval also recommended a functional capacity evaluation which was never approved by Employer/Carrier. (Tr. 35).

Claimant testified Dr. Cobb informed him that he had "several things wrong with" him, his shoulder and neck. Dr. Cobb recommended that he "go to pain management," and consult with Dr. Mitchell. (Tr. 26-27). Claimant testified that Employer/Carrier refused approval for Dr. Mitchell. (Tr. 27).

Although Claimant received weekly workers' compensation benefits, the recommended medical care was never approved. Claimant testified that because of his ongoing pain, he returned to the emergency room of Our Lady of Lourdes Hospital, but Carrier refused to pay for his medical care. (Tr. 28). He sought treatment and monthly injections from Dr. Mitchell for which he used his private health plan. (Tr. 30-31).

Claimant testified that Dr. Cobb was concerned about his neck problem. Claimant had previous problems with his neck which resulted in surgery before beginning work for Employer. He stated that he was "fine" and did not have any further problems with his neck when he started working for Employer. He testified he had no problems with his neck or shoulder during the performance of his work for Employer. (Tr. 20-21). He stated his current neck problems are the result of his work injury because he was healed from his previous neck injury. (Tr. 32).

Claimant testified he was unable to return to Dr. Cobb until workers' compensation agreed "to pay to settle everything." (Tr. 34).

On cross-examination, Claimant testified that he injured his neck and head in a 2002 accident. He initially affirmed that he had no problems resulting from the 2002 accident in his left arm and shoulder. He also sprained his back in 1998. (Tr. 38). He subsequently recanted stating that he had pain and numbness in his left arm from his 2002 accident which "was coming from [his] neck." He had no pain in his left shoulder. (Tr. 39).

He underwent fusion surgery in January 2003 by Dr. Cobb and continued to have pain and numbness for about six months thereafter. (Tr. 39-40). The pain in his left arm and shoulder went away completely by December 2003. (Tr. 40-41). He was then pain free and "feeling fine." He had no pain or problems with his neck as of December 2003. Neither Drs. Duval nor Cobb recommended that he have any additional surgery procedures. (Tr. 41). He did not remember being sent by Dr. Cobb for nerve blocks in February 2004 because of persistent pain in his left arm and shoulder. He then admitted he had "moderate pain." (Tr. 42).

He recalled that in March 2004, he was discharged for light duty, but denied that both Drs. Duval and Cobb told him he had a problem at the level above his fusion and that he needed more surgery. (Tr. 43). He affirmed that he was having no problems when he was discharged. However, Claimant acknowledged that he was taking a prescription medication, Vicocet, for headaches, once every three months. (Tr. 44). He also confirmed that he was taking Lortab, a pain medication, because of leg pain from a stab wound "a long time ago." The Lortab medication was prescribed by Dr. Cobb, but not for his leg pain which he never related to Dr. Cobb. In response to a question regarding the frequency of the use of Lortab, Claimant stated "not that often." He defined "not that often" as once or twice a day. (Tr. 45-46). He then clarified that he did not take Lortab every day in March 2004. He settled his 2002 injury for about $350,000.00 in February or March 2004 about the time he was discharged from medical care. (Tr. 47). He added "I guess I wasn't pain free." (Tr. 50).

He again acknowledged he was not informed of any continuing problems with his neck and was not having any problems when he was discharged in March 2004. He stated he was not having any problems moving his arms, gripping or holding things when he was discharged. (Tr. 48). His "job description/essential functions" personnel form reveals 11 tasks which may be

assigned, of which only one was checked "no," i.e. "grip, grasp and twist using your hands and wrists regularly during your shift." (EX-1, p. 3). Although he acknowledged signing the form, Claimant denied being asked about such job tasks and could not remember "checking that off." He also testified that he did not tell Employer about his fusion surgery, because they did not ask about it. (Tr. 49, 62).

Claimant could not recall how many times he refilled his Lortab prescription, but stated he was not taking Lortab at the time of his job accident. He stopped taking Lortab in May 2004, before he began working for Employer. (Tr. 51). When confronted with refill orders of 80 Lortabs on May 6, 2004, June 15, 2004 and July 28, 2004, Claimant testified that "I get them but I don't take them." He also stated he may have taken one or two after May 2004, and the remainder of the 240 Lortabs were at his house. (Tr. 52-53). He was not taking the medication because he was pain-free. (Tr. 53).

He could not recall anyone asking about his medications when he went to Our Lady of Lourdes Hospital after his job accident/injury. (Tr. 53). The emergency room records for August 9, 2004, shows Claimant reporting that he was taking Lortab, Vioxx, Vicocet, Ambien, Xanax and Robaxin. He testified that he was not taking such medications at the time of the job injury. He understood the query about medications to mean "like anytime in your life," not what medication he was currently taking. (Tr. 54-55).

Claimant testified that Dr. Duval told him his neck was "messed up" because of his August 2004 job accident. (Tr. 55). He confirmed that he complained of shoulder pain, not neck pain, at the emergency room and to Dr. Duval. (Tr. 56). He stated that Dr. Cobb concluded the job accident "aggravated a disc in [his] neck" and recommended surgery as a result of the August 2004 accident to which Dr. Duval agreed. (Tr. 56-57).

Claimant affirmed that he presented to Dr. Taylor for an evaluation for Social Security Disability in January 2005 who found no reasons why Claimant could not go back to work. He related he had also been examined by Dr. Taylor in 2002-2003. (Tr. 58).

The Medical Evidence

Dr. Michael J. Duval

Dr. Duval examined Claimant on August 12, 2004, when he presented for evaluation of his left shoulder. Dr. Duval noted that Claimant had previously injured his left shoulder in a 1998 motor vehicle accident. On physical exam, Claimant complained of pain with usage of his left shoulder. Claimant reported no neck complaints. X-rays of the left shoulder revealed a Type II acromion. Dr. Duval diagnosed a left shoulder strain and recommended a physical therapy evaluation and suggested Claimant get an MRI to determine the extent of his injury. (EX-2, p. 3; CX-1, pp. 4, 14-15; CX-2, p. 45). Claimant was placed on sedentary work status, with no use of his left arm. (CX-1, p. 19).

Dr. Duval observed that he had seen Claimant in the past for a cervical related condition. He noted that when he examined Claimant on October 14, 2003, he had developed a failed cervical segment at C5-6 above the fusion done by Dr. Cobb at C6-7. He noted that Claimant may develop a kyphosis above the level of fusion which could lead to further problems. Dr. Cobb had recommended a second surgery, but Claimant had not undergone the surgery. (EX-2, pp. 5-6).

On August 31, 2004, Claimant returned to Dr. Duval reporting severe pain and that his therapy had not helped. Dr. Duval noted that the therapist had concerns "on whether or not [Claimant] was valid in his presentation." Claimant's exam "was fairly different," complaining of severe pain and trouble lifting his arm. He was given a subacromial injection with no relief from the pain. Claimant's MRI showed some arthritic change involving the AC joint, but a normal rotator cuff. Claimant reported his pain is "more coming from his neck than his shoulder," which Dr. Duval observed was "a bit different from when I initially evaluated him." He agreed with the therapist that "there may be some magnification present." Dr. Duval recommended a MRI of the cervical spine. Claimant was placed on light duty. (EX-2, p. 2; CX-1, pp. 9-12).

On September 23, 2004, Claimant returned to Dr. Duval. He reported he had recently seen Dr. Cobb who recommended neck surgery. Dr. Duval reported that Claimant "spent most of his time trying to convince me that I need to document that it was his neck that was the problem when I initially saw him, although

he reported shoulder pain, and really no neck complaints." Dr. Duval informed Claimant that he could not alter his records. He opined that Dr. Cobb's recommendation for surgery had been made prior to Claimant's recent injury. Dr. Duval had nothing further to offer Claimant. He noted that the therapist thought Claimant was faking in physical therapy. Dr. Duval suggested a Functional Capacity Evaluation (FCE) may be advisable in this situation. (EX-2, p. 1; CX-1, p. 8).

Dr. John E. Cobb

Dr. Cobb's records show he examined Claimant after a February 2, 2002 offshore work accident/injury for pain in his neck and back and for headaches. Claimant also complained of pain in his right thigh, numbness in the left arm and left leg. A MRI showed mild spondylosis at C5-6 and C6-7, which was worse causing a moderate degree of foraminal stenosis and compromising the neural canal. Dr. Cobb recommended surgery for the C6-7 level, which was performed on January 3, 2003. (EX-3, pp. 9-14). Claimant continued in follow-up with Dr. Cobb. On May 19, 2003, Dr. Cobb opined that the space at C5-6 had collapsed more and there was some degree of impingement of the C5 cubital body. (EX-3, p. 6). On July 14, 2003, Dr. Cobb again expressed concern for the C5-6 level and the need for a MRI. (EX-3, p. 5).

On November 21, 2003, a MRI of the cervical spine was conducted. (EX-4, p. 3). On December 8, 2003, Dr. Cobb opined that the MRI demonstrates a very small, right paracentral extradural defect and recommended a fluoroscopy guided transforaminal selective nerve block at the C5-6 level on the left side. Dr. Cobb assessed Claimant as having a traction radiculitis. (EX-3, p. 2). Authorization was requested of Zurich American and the nerve block was performed on February 14, 2004, at Our Lady of Lourdes Hospital. (EX-5, p. 1). On March 1, 2004, Claimant's arm was much better and his pain was manageable. Dr. Cobb recommended Claimant's return to light work. (EX-3, p. 1).

On September 15, 2004, Claimant presented to Dr. Cobb "for follow-up" with complaints of left shoulder pain. (CX-2, p. 12). Claimant informed Dr. Cobb that he was having no problems with his neck at all since his surgery when he was involved in a job accident offshore "injuring the left side of his neck and his arm and shoulder." Dr. Cobb reviewed the August 16, 2004 MRI of the shoulder and saw no signs of rotator cuff type injury. He also reviewed a recent cervical MRI which showed a

small paracentral spur on the right side at C5-6, but no stenosis. On examination, Dr. Cobb noted Claimant was complaining of pain in his shoulder and arm and some pain in his back into his left leg. Claimant showed some mild impingement tendonitis on exam of his shoulder with a weakened rotator cuff. Dr. Cobb assessed Claimant with a strain of the rotator cuff and a possible lower brachial strain. He recommended conservative management and opined that Claimant was not a surgical candidate. There is no indication that Dr. Cobb placed Claimant on a no-work status. (CX-2, p. 16).

On October 27, 2004, Claimant again presented to Dr. Cobb with symptoms into his left arm. Dr. Cobb informed Claimant that his injury is "more of a neuropraxia with perhaps some associated brachiitis." Claimant reported to Dr. Cobb that he had been informed that his injury may possibly represent "a disc related condition," which Dr. Cobb explained was not a surgical option. Dr. Cobb opined that Claimant may get better with time and medications. He recommended that Claimant be referred to Dr. Matthew Mitchell "for consideration of additional nonsurgical options involving his left arm." (CX-2, p. 15).

On October 31, 2005, Claimant presented to Dr. Cobb to "update his condition." Claimant reported he was still having symptoms of neck and left arm pain. Dr. Cobb noted that it had already been established that there was no surgical option for Claimant. He assessed Claimant with cervical radiculitis. Claimant informed Dr. Cobb that none of the recommendations for pain management had been approved by Employer/Carrier. Dr. Cobb had nothing further to offer Claimant, but placed Claimant on "no work status pending treatment today." Claimant was prescribed medications, but no return appointments were scheduled. (CX-2, pp. 13-14).

Dr. Matthew Mitchell

Dr. Mitchell, a board-certified anesthesiologist with a sub-specialty in pain medicine, evaluated Claimant on February 20, 2006, for neck, back and left arm and leg pain. Claimant reported to Dr. Mitchell that he was pain free in his neck and arm after his January 2003 surgery until his work accident of August 9, 2004. Claimant reported experiencing "a tearing sensation in his left shoulder and pain down his left leg." On physical examination, Dr. Mitchell noted that Claimant's left shoulder is lower than his right and his range of motion of the

left shoulder reproduces his pain. Dr. Mitchell opined that Claimant was a good candidate for a cervical epidural injection and physical therapy to prevent further loss of strength in the left upper extremity. (CX-2, pp. 42-44).

Dr. Mitchell administered cervical epidural injections on March 24, 2006, April 27, 2006 and May 24, 2006. (CX-3, pp. 7, 10, 15).

Dr. Raymond F. Taylor

Dr. Taylor examined Claimant on January 27, 2005, at the behest of the Social Security Administration for his claim of disability. Claimant complained of pain in his neck, upper back and left shoulder with symptoms present since February 2002. Claimant reported that although he still had lower neck pain, he returned to work. In August 2004, he re-injured himself after a lifting accident. (EX-7, p. 1).

Dr. Taylor reviewed the medical records of Dr. Cobb which revealed that Claimant's September 14, 2004 cervical spine MRI showed a fusion at C6-7 and no other significant findings. (EX-7, p. 1). A MRI of the shoulder of August 16, 2004, demonstrated no evidence of any rotator cuff type injury. (EX-7, p. 2).

On physical examination, Dr. Taylor found Claimant's range of motion of the back and neck and the extremities to be normal. His diagnoses were history of anterior cervical fusion and left shoulder pain, etiology unknown. He concluded that Claimant's physical exam was completely normal and there was no reason to limit Claimant's work-related activities. (EX-7, pp. 4-5).

The Contentions of the Parties

Claimant contends he injured his left shoulder while working for Employer for which Dr. Duval recommended physical therapy and a functional capacity evaluation to determine his limitations. Dr. Cobb also examined Claimant and placed him on no work status, recommended conservative management and referred him to Dr. Mitchell for additional non-surgical options. Claimant seeks the approval of recommended medical care and reinstitution of temporary total disability compensation benefits until his work capacity is known.

Employer/Carrier argue that Claimant's ongoing medical problem is not associated with his job injury but a 2002 non-related neck injury from which he never fully recovered. They further submit that Claimant's credibility is lacking with regard to his complaints and medical presentation which are outweighed by the medical evidence of record. Employer/Carrier contend that any cervical problems which Claimant may have or claim are not related to his job injury but to a pre-employment injury for which they are not responsible. At most, Employer/Carrier argue Claimant suffered a left shoulder strain for which he received appropriate medical care and indemnity benefits.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are

accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Based on the stipulations of the parties, I find that Claimant was injured on August 9, 2004, while working for Employer. Although Claimant appears to contend that he injured

his left shoulder and neck, Counsel for Claimant, in brief, argues that Claimant's injury is limited to his left shoulder.

Claimant complained of left shoulder pain when he reported to the emergency room at Our Lady of Lourdes Hospital on August 9, 2004, and subsequently to Dr. Duval and Dr. Cobb. He testified that he felt a lot of pain in his left shoulder immediately after the wrench accident.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain to his left shoulder on August 9, 2004, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

I find that Claimant has not established a **prima facie** of an injury to his neck as a result of the August 9, 2004. Claimant's testimony is vacillating and inconsistent regarding his alleged cervical injury. He had a history of cervical injury prior to employment with Employer which resulted in fusion surgery at the C6-7 level in January 2003. He was released in March 2004 to light work by Dr. Cobb, who expressed concern for the space above the fusion, C5-6, which appeared to be collapsed. Although Claimant professed to be "pain free" thereafter, his prescription refills of Lortab, a pain medication, contradict his assertions. His testimony that he refilled the prescription but did not use the medication is deemed incredible.

Furthermore, Claimant testified that Dr. Duval informed him that his shoulder was not his problem, but his neck was "all messed up." Dr. Duval's records belie such a conclusion since he specifically denied any complaints of neck pain reported by Claimant and refused to alter his records later at Claimant's request to reflect initial complaints of neck pain. Moreover, contrary to Claimant's testimony, Dr. Cobb did not recommend

surgery as an option for his neck, but rather opined that surgery was not an option. Neither Drs. Duval nor Cobb opined that Claimant's cervical area was injured or aggravated by his August 9, 2004 job accident.

Moreover, Claimant's pre-employment diagnosis of cervical radiculitis is the same assessment assigned by Dr. Cobb in October 2005 for Claimant's cervical condition. The December 8, 2003 cervical MRI demonstrating a small paracentral extradural defect which was treated by Dr. Cobb with fluoroscopy guided nerve block in February 2004, appears to be the same small paracentral spur seen on the August 14, 2004 cervical MRI. Finally, no further treatment for his alleged cervical condition was documented or considered medically necessary by Drs. Duval or Cobb.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

"Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand

Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier have presented no evidence to rebut the presumption that Claimant injured his left shoulder while working for Employer. Employer/Carrier argue that Claimant's credibility precludes such a finding, however objective medical evidence establishes that Claimant sustained a left shoulder strain for which physical therapy was recommended by Dr. Duval. Although Claimant's presentation during physical therapy affects the extent of his shoulder injury and the existence of a cervical injury, it does not diminish the objective evidence of a left shoulder injury.

Accordingly, I find and conclude that Claimant injured his left shoulder on August 9, 2004, for which Employer/Carrier are responsible.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable left shoulder injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his

inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction

Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The uncontradicted medical evidence of record establishes that Claimant was initially restricted to sedentary work by Dr. Duval on August 12, 2004 until August 31, 2004, when he was placed on light duty. On September 23, 2004, Dr. Duval opined that he had nothing further to offer Claimant and suggested a functional capacity evaluation be performed. On September 15, 2004, Dr. Cobb recommended conservative management until October 27, 2004, when he referred Claimant to a pain management specialist, Dr. Mitchell, for consideration of additional non-surgical options involving his left arm. The FCE and treatment by Dr. Mitchell were not approved by Employer/Carrier.

On October 31, 2005, Claimant was placed on no work status by Dr. Cobb pending treatment which was never approved by Employer/Carrier. Claimant sought medical care from Dr. Mitchell at his own expense which included three cervical epidural injections and recommended physical therapy to prevent further loss of strength in the left upper extremity.

I discount the opinion of Dr. Taylor who examined Claimant for Social Security disability purposes on one occasion and did not treat or medically manage his symptoms and complaints and whose opinions conflict with Claimant's treating physicians.

In view of the foregoing, I find and conclude that Claimant has not reached maximum medical improvement for his left shoulder injury since he was not provided the recommended medical care of his treating physician Dr. Cobb which he deemed medically necessary for treatment of his left arm. Since Claimant has not reached maximum medical improvement, he remains temporarily totally disabled.

The record reveals that Claimant's former job required lifting and/or carrying up to 25 pounds regularly which by definition exceeds the light category of work. (EX-1, p. 3). Claimant has not been released by any physician to perform work beyond light work. Accordingly, I find and conclude that Claimant could not perform his former work for Employer and is temporarily totally disabled and entitled to disability compensation benefits from August 9, 2004, to present and continuing based on his average weekly wage of $683.09.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

The record is devoid of any evidence of any suitable alternative employment opportunities available to Claimant. Therefore, I find and conclude that Employer/Carrier have not established suitable alternative employment and Claimant continues to be totally disabled.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was

necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Employer/Carrier provided physical therapy recommended by Dr. Duval in August 2004, but not the recommended FCE. Dr. Cobb recommended referral to Dr. Mitchell for consideration of additional options involving Claimant's left upper extremity which was not approved. Dr. Mitchell performed three cervical epidural injections and recommended physical therapy associated with preventing further loss of strength in Claimant's left upper extremity. There is no countervailing medical evidence of record. I find and conclude that the recommendations of Drs. Duval, Cobb and Mitchell regarding Claimant's left upper extremity were reasonable and necessary for the medical care and treatment of Claimant's work-related left shoulder injury.

I find that Employer/Carrier's refusal to approve the foregoing recommendations excused Claimant from further seeking authorization to so treat, particularly with Dr. Mitchell. I further find that the treatment procured by Claimant from Dr. Mitchell on his own initiative was reasonable and necessary for treatment of his left shoulder injury.

I find and conclude that Employer/Carrier remain responsible to Claimant for continuing medical care and treatment related to his left shoulder injury. Employer/Carrier are also responsible to reimburse Claimant for any and all medical expenses paid in association with medical treatment procured on his own initiative, to include services and recommendations provided by Dr. Mitchell, emergency room treatment at Our Lady of Lourdes Hospital, and any and all prescription medications related to his left shoulder injury.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, I find that Employer/Carrier paid compensation to Claimant from August 9, 2004 through September 2, 2005, at which time compensation was terminated. Employer/Carrier filed a timely notice of controversion on September 6, 2005. Accordingly, Employer/Carrier are not liable for any penalties under the Act.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from August 9, 2004 to present and continuing, based on Claimant's average weekly wage of $683.09, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 9, 2004 left shoulder work injury, pursuant to the provisions of Section 7 of the Act, consistent with this Decision and Order to include services and recommendations provided by Dr. Matthew Mitchell.

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[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **February 21, 2006**, the date this matter was referred from the District Director.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 14th day of May, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge